Supreme Court, U.S.
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No. 97-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

CARTER G. PHILLIPS
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of the State of Missouri
JOHN R. MUNICH *
Deputy Attorney General for Litigation
MICHAEL J. FIELDS
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

Attorneys for the State of Missouri, et al.

* Counsel of Record

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REPLY BRIEF FOR PETITIONERS

This Court's docket is replete with cases presenting close legal questions. This case of clear national importance, however, is not one of them. Given the admitted absence of *any* "determination with respect to an interdistrict violation" (Pet. App. 19a)—not to mention *any* record evidence of such a violation—this Court's decision in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995) ("*Jenkins III*"), compels the conclusion that the courts below have no power under the Constitution to require the State of Missouri to fund interdistrict busing efforts between St. Louis and neighboring suburban school districts. The Eighth Circuit's extraordinary decision cries out for this Court to intervene in defense of the federalism interests vitiated by the courts below for almost two decades. Unless this Court is to turn a blind eye to the principles reaffirmed in *Jenkins III*, a writ of certiorari should issue.

1. Rather than mount a serious defense of the ruling below under *Jenkins III*, respondents argue that the admission of new students last Fall into the interdistrict program mooted this proceeding because the State's motion "requested only that the district court suspend the entry of new students into the VITP for the 1997-98 school year." U.S. Opp. 10.[1] These assertions are wrong.

The issues presented in this hotly-contested case remain "live" and are of paramount interest to the State and all of its citizens—who have been saddled for nearly 20 years with funding extraordinary interdistrict activities in St. Louis at a weekly cost of $2 million and a cumulative cost to date of more than $1 billion. Contrary to re-

[1] *See also* Brief in Opposition of Michael Liddell, *et al.*, and the National Association for the Advancement of Colored People (hereinafter NAACP Opp.) 20-22; Brief in Opposition of the Board of Education of the City of St. Louis (hereinafter Bd. Opp.) 22-24. The State's motion appears at the end of the Board's Opposition.

spondents' false claim that petitioners' motion merely sought to bar new entrants during 1997-98, the motion explicitly requested two additional forms of relief: (1) cessation of "any steps to recruit and enroll new students into the VIDT program for [that] school year"; and (2) a declaration clarifying that "the State has no financial obligation as to such students." Both forms of relief remain available.[2] The continued availability of some form of relief is "sufficient to prevent this case from being moot."[3] *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992).

2. Respondents' arguments on the merits are equally erroneous. Although the Petition carefully documents the patent inconsistency between the decision below and *Jenkins III* and its antecedents (Pet. 12-13) and decisions of other Circuits (Pet. 23-26), respondents argue that the

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[2] Respondents cannot (and do not) deny that the State continues, under compulsion of court order, to expend resources recruiting and enrolling new students into the program for the current year. Also, petitioners' requested declaration, although limited to students who enrolled during 1997-98, was *not* limited to the 1997-98 school year. The State explicitly sought an order rejecting respondents' "united position that once enrolled in the program, every VIDT child is absolutely entitled to continue through the program through graduation, even *after* this Court declares the SLPS unitary." Thus, the declaration sought relief for up to twelve years into the future (in the case of a new student entering the VIDT in 1997-98 as a first-grader) for all new students admitted to the program in 1997.

[3] Respondents' analogy to cases in which parties plaintiff sought injunctions compelling action that had already been taken by the time of appeal (U.S. Opp. 11) or barring conduct that had already occurred (NAACP Opp. 21; Bd. Opp. 22) is strained indeed. Despite respondents' assertions that "the relief sought [by petitioners] is an injunction" (NAACP Opp. 21; *see also* Bd. Opp. 22), petitioners sought not an injunction, but the modification of an injunction *against them* pursuant to Fed. R. Civ. P. 60(b). In any event, mootness on appeal provides a reason to grant, not deny, certiorari. *See, e.g., U.S. Bancorp Mtge. Co.* v. *Bonner Mall Ptnrshp.*, 513 U.S. 18, 23-25 (1994) (judgment should be vacated if appeal becomes moot through happenstance or conduct of appellees).

Eighth Circuit's opinion did not mean what it so plainly held. They also argue that, under *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), the court below had the discretion to leave the interdistrict remedy in place indefinitely without the findings required by *Jenkins III*. Both claims are wrong.

a. Respondents' disingenuous attempts to deny the obvious holding of the Eighth Circuit merit only brief attention here, for they are refuted by the opinion itself (Pet. App. 1a-22a). The constant refrain of respondents here is that "[t]he court of appeals merely held that until [settlement] negotiations are complete, the district court was within its discretion in temporarily maintaining the remedy" (Bd. Opp. 2; see also U.S. Opp. 6). Such claims simply cannot be made in good faith.

The question of whether it was an abuse of discretion to continue the interdistrict funding orders in effect pending proceedings before the Settlement Coordinator was addressed in the first section of the court's discussion, entitled, "The District Court Did Not Abuse Its Discretion in Denying the State's Motion to Phase Out the VITP." Pet. App. 13a. The court of appeals, however, did not end its opinion there, as respondents falsely imply. Instead, two sections later in its opinion, under the heading, "The *Jenkins III* Issue," the court confronted what it correctly termed "[t]he State's principal argument," *i.e.*, "that the district court is without discretion in this matter and that *Jenkins III* requires that the VITP be phased out now."[4] Pet. App. 19a.

The Eighth Circuit rejected that argument with a purported distinction of *Jenkins III* on two entirely specious

[4] Thus, the court below addressed two discrete issues: (1) whether *Jenkins III* bars interdistrict relief absent proven interdistrict violations (Pet. App. 19a-21a); and (2) whether, assuming *Jenkins III* interposes no such bar, the district court abused its discretion in maintaining the interdistrict funding orders pending the outcome of proceedings before the Settlement Coordinator (*id.* 13a-16a). Only the first issue is presented here.

grounds (Pet. 16-17): (1) *Jenkins III* is limited to cases where the interdistrict remedy in question is intended to promote the " 'desegregative attractiveness' " of city schools in other districts or " 'suburban comparability' " (Pet. App. 20a); and (2) *Jenkins III* forbids interdistrict relief only where the "trial court [has] specifically found that no interdistrict violation had taken place" (*id.* 19a). It was these purely legal conclusions that led the court below to "follow [its] numerous precedents" upholding the interdistrict funding orders despite *Jenkins III*'s reaffirmance of the self-described "holding" in *Milliken I*, *Milliken* v. *Bradley*, 418 U.S. 717, 752 (1974), that "absent an interdistrict violation, there is no basis for an interdistrict remedy." [5]

Having made no attempt to defend the contrived distinctions of *Jenkins III* offered below, or to dispute that other Circuits have ruled that an adjudged interdistrict violation is a constitutional prerequisite to interdistrict relief, respondents proceed to misrepresent the ruling below. They nakedly assert that the court of appeals "did not" uphold the interdistrict funding orders as "an appropriate remedy for an *intra*district violation" (U.S. Opp. 7; see also NAACP Opp. 23). These puzzling assertions are foreclosed by the series of decisions issued by the court of appeals in this matter since 1980. As the en banc court unequivocally explained in *Liddell VII*: "This Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy *for the*

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[5] The NAACP respondents' claim that the Eighth Circuit has "consistently recognized the authority of *Milliken* [*I*] in all prior stages of this litigation" (Opp. 22 n.6) is false. In *Liddell VII*, the en banc court ignored the findings requirement of *Milliken I*, following instead dicta in *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), that seemingly relaxed the rule of *Milliken I*. 731 F.2d at 1308; *see also Liddell V*, 677 F.2d 626, 630 (8th Cir. 1982) (citing *Hills* but not *Milliken I*). *Jenkins III* explicitly limited *Hills* to desegregation suits against federal agencies and reaffirmed *Milliken I* as controlling in cases involving States. 515 U.S. at 96-98; *contra* NAACP Opp. 25-26.

unconstitutional segregation of the city schools," i.e., as "an effective remedy *for the* [*State's*] *intradistrict violations.*" 731 F.2d at 1302 (emphasis added) (citing cases). The opinion below explicitly "follow[ed] [its] numerous precedents" in this regard after brushing aside the clear holding of *Jenkins III* to the contrary (Pet. App. 21a). Quite clearly, then, the court below *did* hold that "an interdistrict remedy need not be predicated on an interdistrict violation" (NAACP Opp. 23).[6] That holding flies in the face of *Jenkins III*, *Milliken I* and other controlling decisions from this Court, thereby warranting summary reversal, and has created a square Circuit split.

b. Respondents next argue that even if *Jenkins III* is to be honored, the constitutionally impermissible remedy upheld below should remain in place as long as further proceedings are taking place in this already decades-old case. Citing only a brief passage in *Dayton I* that this Court has never cited or relied upon, they assert that a court "has discretion to leave [such a] remedy in place pending the outcome of further proceedings aimed at determining what remedy is appropriate" (U.S. Opp. at 9). Putting aside the fact that this argument was not raised or adopted below, *Dayton I* simply will not bear the weight respondents place upon it. Although the necessary findings had not been made in *Dayton I* with the requisite level of specificity, the system-wide remedy question had *already* been the subject of extensive litigation and proofs, and so the necessary findings could be (and were) readily supplied on remand.[7] *Id.* at 419. The im-

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[6] Of course, even if the opinion below had not relied on that ground, the *Jenkins III* issue would, in light of the Eighth Circuit's prior rulings on that subject (*e.g.*, *Liddell VII*), nonetheless be properly presented here. It is hornbook law that legal issues decided at prior stages of a proceeding by a lower court can be reviewed in this Court, whether or not certiorari was sought at an earlier time. *See generally* R. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) (citing cases).

[7] Indeed, as then-Justice Rehnquist repeatedly noted in his majority opinion, the plaintiffs had cross-appealed urging that the district court "had erred in failing to make further findings tending to show

precision of the district court's findings left the Court unable to determine whether or not "the case for displacement of the local authorities" had been "satisfactorily established by factual proof." *Id.* at 410.

The state of the record here is quite the opposite. As the NAACP respondents admit, "the existence of an interdistrict violation ha[s] *never* been litigated in St. Louis" (Opp. 16 (emphasis added)). It thus is no surprise that the present record on the interdistrict liability question contains merely "unresolved allegations" (U.S. Opp. 7) and "untried allegations" (*id.* at 8), and the court of appeals therefore properly concluded that it "could not make a proper determination" of such liability (Pet. App. 20a).

Mere allegations of constitutional violations, not subjected to the rigors of the truth-finding process, are an insufficient basis for imposing or maintaining a coercive order against a State. This is why *Milliken I* explicitly set aside the interdistrict busing order issued in metropolitan Detroit where, as here, "there [wa]s no evidence in the record" that interdistrict violations had occurred. 418 U.S. at 748. Tellingly, respondents do not reconcile their tortured reading of *Dayton I* with *Milliken I*.

There is another critical distinction between this case and *Dayton I*, which respondents ignore. The stated purpose of the remand there, as correctly described by the NAACP respondents, was to permit the court "to determine whether there is an adequate alternative basis for relief," *i.e.*, a violation commensurate with the remedy ordered (Opp. 24; see also U.S. Opp. 9). See *Dayton I*, 433 U.S. at 419. Clearly, the purpose of the proceedings contemplated by the court of appeals below is *not* to determine whether interdistrict violations have occurred. Rather, those proceedings are designed to *avoid* any litigation or fact-finding on the all-important issue of inter-

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segregative actions" supportive of system-wide relief. *Id.* at 416; *see also Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 532 (1979) (remedy was left intact pending remand in *Dayton I* due to "the confusion evidenced at various stages of the proceedings regarding the scope of the violation established").

district liability. In fact, the court of appeals explicitly ruled (Pet. App. 19a) that it would be *unconstitutional* to conduct any litigation on that issue: "To require the County Districts to litigate this issue now, after voluntarily accepting thousands of city transfer students for twenty years, would violate their fundamental right to due process." [8] In light of this ruling, it is clear that no proceedings on interdistrict liability are contemplated (or even remotely possible) in this case. Leaving a constitutionally unsupported order against a State in place indefinitely, while proceedings are conducted for purposes other than deciding whether interdistrict violations have occurred, is not even remotely authorized by *Dayton I*.[9]

3. Finally, a few observations are in order regarding the most glaring of respondents' many misrepresentations of the procedural history of this case. The NAACP respondents (Opp. 7-8) and the City Board (Opp. 10-13) argue that the State itself is responsible for the protracted delays in this litigation. The argument is false. For the past seven years, the State's consistent efforts to end court supervision in St. Louis have been frustrated by court inaction based upon arguments by respondents that it is too early even to begin considering phasing out any aspect of the interdistrict program that the State has been compelled to fund in St. Louis for almost two decades.[10]

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[8] The City Board's attempt to deny the existence of this holding (Bd. Opp. 18 n.7) is pure sophistry so clearly refuted by the Eighth Circuit's opinion as to require no additional response.

[9] Contrary to the suggestion of the NAACP respondents (Opp. 24 n.9), petitioners have never challenged their right to proceed on claims that interdistrict violations occurred. Indeed, petitioners' view is that respondents *must* do so (and prevail) if they and their "friendly adversar[ies]" wish to "extract[] funds from the state treasury" for further interdistrict efforts. *Jenkins III*, 515 U.S. at 99-100. The short answer to the Board's desperate plea that it needs these funds (Opp. 20-21) comes from *Jenkins III*—"dependence on state funding" hardly justifies "continued supervision by the District Court." 515 U.S. at 99.

[10] For example, respondents conceal from the Court the fact that they responded to the State's 1991 unitary status motion with a

That this litigation has been unduly delayed through the machinations of respondents—who reap $2 million in court-ordered funding from the State for each week the litigation status quo is maintained—is clear from even a synopsis of the proceedings. Although the State originally moved for a declaration of unitary status in October 1991, the district court *never* even scheduled a hearing on that motion. Faced with this inaction, the State filed a second motion (this time for a declaration of partial unitary status) on May 7, 1992, followed by a third in November 1993. Respondents have consistently opposed even setting a hearing date for the motions.[11] To this day, these motions remain pending.

Consequently, it was not until March 1996, fully *16 months* after the November 1994 trial date requested by the State, that the court finally conducted the required evidentiary hearing.[12] Almost two years after the submis-

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barrage of motions for protective orders. When court-ordered negotiations failed to resolve the dispute, the State moved to compel answers to the interrogatories (G(352)92). Although the district court ultimately ordered respondents to file answers (G(368)92), responses were not actually filed until July 1992, nine months (and $52 million) after the interrogatories were propounded.

[11] *See, e.g.*, G(1379)94 (pleading by NAACP respondents arguing that "the Court should not set a hearing and discovery schedule"); G(1468)95 (noting City Board claim that no hearing should be scheduled until the State files a long-term financing plan to fund the interdistrict busing plan upon restoration of local control).

[12] Respondents' assertions that the delay in scheduling the hearing resulted from the State's "conce[ssion] that it was not able to prove the allegations in its [third] motion" (Bd. Opp. 11; *see also* NAACP Opp. 7) are simply false. Far from conceding any such thing, the State reasonably requested that the court first establish an orderly process of discovery, with a specified cut-off date, to prevent respondents from indefinitely delaying the hearing by lodging frivolous objections, as they did in response to the State's 1991 motion. Respondents also fail to note that they again moved to suspend all proceedings once this Court granted certiorari in *Jenkins III*—a position that, given their assertions here that the facts in St. Louis "differ significantly from Kansas City[, which *Jenkins III* addressed]" (Bd. Opp. 12; U.S. Opp. 7), could only have been taken for the improper purpose of delay.

sion of proofs on the unitary status issue, the court has yet to rule on that issue and, in fact, on April 23, 1996, disclaimed any intention to rule (or even allow briefing) on the issue for the foreseeable future (G(2062)96).[13]

Equally disingenuous are respondents' claims concerning the proceedings before the Settlement Coordinator. The NAACP respondents purport to challenge petitioners' assertion that he has "initiated but a handful of meetings over 19 months" (Pet. 10), but ultimately admit that "only a limited number of large group meetings involving all the parties' counsel have been convened" (Opp. 11).[14] Although respondents hide behind the veil of a confidentiality order, the undisputed fact is that the last meeting of all the parties before the Settlement Coordinator occurred almost one year ago, on March 10, 1997, and that there are *no* settlement offers being discussed by the parties, and *no* additional meetings are scheduled. If that is not an "impasse," the concept has lost all meaning. Finally, the NAACP respondents and the City Board at-

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[13] The NAACP respondents take issue with the educational figures cited in the Petition, offering instead highly misleading figures based on unverified data not of record (Opp. 9 & n.4). The State's data are the official, verified figures, which were received into evidence at the unitary status hearing without challenge or counterproof by respondents. The attack by the NAACP respondents on the undisputed fact, admitted to under oath by St. Louis' own school board president and school superintendent, that City schools are free from discriminatory policies or practices, is misguided. That is why they rely on unidentified "vestiges of the *de jure* system" that existed prior to 1954 (Opp. 10) rather than present-day discrimination in a system that is majority-black and in a school district that has "achieved a high degree of integration" (Pet. App. 20a).

[14] It may be, as the NAACP respondents suggest (and as respondents' fee-petitions in the court below confirmed), that the Settlement Coordinator has conducted other *ex parte* meetings, to which counsel for the State were not invited. That, however, only reinforces petitioners' claim that he has abandoned any pretense of impartiality and assumed the role of an advocate committed to preserving state-funded busing in St. Louis over the State's objection.

tempt to explain away their prior statements refusing to accept anything short of total capitulation by the State (NAACP Opp. 14; Bd. Opp. 5 n.2); however, their own words, pointed to or quoted by petitioners (Pet. 10, 28-29), belie their revisionist claims here.

In the end, of course, the salient facts for purposes of the *Jenkins III* issue are both undisputed and indisputable: (1) the *sole* basis for the issuance and affirmance of the interdistrict funding orders by the courts below is an intradistrict violation at the elementary and secondary levels within St. Louis; and (2) "the existence of an interdistrict violation ha[s] never been litigated in St. Louis" due to a settlement among respondents that was imposed on the State over its objection (NAACP Opp. 16). In light of these facts, petitioners are plainly entitled to the relief they seek under *Jenkins III*. Only this Court's intervention can ensure that *Jenkins III* does not become a dead letter, and that the Eighth Circuit's "perpetual interdistrict remedy machine" (Pet. 29) does not steamroll over the rights of Missouri citizens well into the next millennium.

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The petition for writ of certiorari should be granted, and the decision below reversed (either summarily or after plenary review).

Respectfully submitted,

CARTER G. PHILLIPS
STEPHEN F. SMITH
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JEREMIAH W. (JAY) NIXON
Attorney General of the
State of Missouri
JOHN R. MUNICH *
Deputy Attorney General for
Litigation
MICHAEL J. FIELDS
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

Attorneys for the State of Missouri, et al.

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* Counsel of Record